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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on the 4th day of June, 1964.

Such judgment affirmed an order of the National Labor Relations Board finding Petitioner had engaged in alleged secondary boycott activity in violation of Section 8 (b) (4) (A) and (B) of the National Labor Relations Act, Title 29 Sec. 158 (b) (4) (A) and (B) of the United States Code and directing Petitioner to cease and desist from engaging in conduct in violation of said sections of

the National Labor Relations Act not only as to the charging party, Overnite Transportation Company and those persons doing business with Overnite Transportation Company, but also as to "any other person engaged in commerce or in an industry affecting commerce."

OPINION BELOW

The opinion of the Court of Appeals below is not yet reported in Federal 2d. and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on the 4th day of June, 1964, and the decree on the 29th day of June, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in enforcing so much of the National Labor Relations Board's Order as goes in its remedy beyond actions of Petitioner relating to the parties to this cause and persons doing business with said parties and requires the Petitioner to refrain from certain acts as to "any other person engaged in commerce or in any industry affecting commerce" notwithstanding:

1. Said remedy is not primarily based upon the evidence in this cause but is based upon alleged violations of the law in other cases not mentioned in the complaint or in any way referred to in the evidence in this cause.

2. No notice was given in the pleadings or at the

hearing of the cause that it was alleged that petitioner was an unusually frequent and wilful violator of the National Labor Relations Act or that any unusual remedy would be sought.

3. The granting by the National Labor Relations Board of said unusual remedy by reliance upon matters not in evidence without notice that said issue was involved and without any opportunity to present evidence and otherwise be heard at the trial of this cause as to said issue was a denial of due process of law as provided by the Fifth Amendment to the Constitution of the United States.

4. Neither the evidence in this cause nor the history of petitioner's activities as set forth in the other cases cited by the National Labor Relations Board as justification for said unusual order established that petitioner has engaged in such conduct or will engage in such conduct in the future as to justify the issuance of such a Broad Order.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 29 U.S.C., Sec. 141, et seq., Title 29 U.S.C., Sec. 158 (b) (4) (A) and (B):

> "(b) It shall be an unfair labor practice for a labor organization or its agents —
>
> . . . . . .
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: . . . .

". . . . *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter:"[1]

PROVISIONS OF UNITED STATES CONSTITUTION INVOLVED

The pertinent provisions of the United States Constitution are the following portions of the Fifth Amendment to the United States Constitution:

"No person shall . . . . be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This petition for certiorari is filed from a decision of

[1] The language quoted is the Statute as it read in the year 1959 at all times relevant to this case. Said Statute has subsequently been amended.

the United States Court of Appeals for the Fifth Circuit upon petition to review a decision of the National Labor Relations Board finding petitioner in certiorari in violation of Section 8 (b) (4) (A) and (B) of the National Labor Relations Act. The National Labor Relations Board filed with the United States Court of Appeals for the Fifth Circuit a cross-petition to enforce. The said petition to review was denied and said cross-petition granted.

The United States Court of Appeals for the Fifth Circuit had jurisdiction of this cause by reason of Title 29, Section 160 (e) and (f) of the United States Code. The National Labor Relations Board had initial jurisdiction of this cause by reason of Title 29, Section 141 et seq. of the United States Code.

Case No. 20,757 of the Court of Appeals for the Fifth Circuit in which the National Labor Relations Board filed its petition to enforce against certain other Unions involved in the same controversy was consolidated with this case in said Court. Petitioner in certiorari was not and is not now a party to case No. 20,757. Case No. 20,757 was not resisted by the Unions which were respondents therein, and an Order to enforce was entered in said case as to said Unions. This petition for certiorari is not prayed as to case No. 20.757, which case relates to said Unions, but petition for certiorari is prayed only from the United States Court of Appeals for the Fifth Circuit Case No. 19,358, the case relating to petitioner in certiorari, Truck Drivers & Helpers Local Union No. 728.

It is the contention of the National Labor Relations Board and the Board, as well as the Court of Appeals for the Fifth Circuit, so found that on or about the 17th

day of May, 1959, petitioner, Truck Drivers & Helpers Local Union No. 728, hereinafter referred to as Local 728; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 71, hereinafter referred to as Local 71; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 55, hereinafter referred to as Local 55; and General Drivers, Warehousemen & Helpers, Local Union No. 509, hereinafter referred to as Local 509, banded together in a general overall strike of Overnite Transportation Company in the States of Virginia, North Carolina, South Carolina, and Georgia, and engaged in a secondary boycott in violation of Sections 8 (b) (4) (A) and (B) of the National Labor Relations Act, Title 29, Section 158 (b) (4) (A) and (B) U.S.C.

The Trial Examiner initially dismissed the Complaint on the ground that the National Labor Relations Board's General Counsel had improperly split the cause of action and had put the respondent to a previous trial in Board Case No. 11-CC-16 in the State of North Carolina. Exceptions were filed to the National Labor Relations Board, and the Board overruled the Trial Examiner and referred the case back to the Trial Examiner for decision on the merits. (Printed Record, pages 62 through 74.) In his second Intermediate Report the Trial Examiner found that in several instances job stewards were asked by employees of secondary employers whether they were required to handle freight under the collective bargaining contract. The President of the Union was also asked a similar question on one occasion. Said job stewards correctly advised those asking said question as to the protection the contract gave them, but in each instance told the

employees that the decision was for them to make without any suggestion from the job stewards as to what their decision should be. All of said instances were prior to the effective date of the 1959 amendments to the National Labor Relations Act, and the so-called hot cargo clause of the contract was at that time legal. (Printed Record, 77, 78, 80, Joint Appendix 18, 19, 20, 81, 82.)

The Board further found that an organizer for Teamsters Joint Council No. 9 requested three over-the-road drivers to respect the picket line. (Printed Record 78, 79.) The only testimony as to said occurrence was from said organizer Evans, who had given an affidavit to the Board during its administrative investigation, which affidavit contained said facts, but the said Evans finally on cross-examination completely repudiated his affidavit in the testimony in this clause. (Joint Appendix, 34, 35.)

It was further found that when freight was presented to a Union steward at Great Southern Trucking Company, the steward told the primary employee presenting the freight he would not handle it because of the strike. (Printed Record, 80, Joint Appendix 12, 13, 14, 15.)

It was also found that a job steward, contrary to Union instructions, on one occasion told the employees of a secondary employer not to handle the freight for the primary employer when the secondary employer's dock foremen began handling the freight in violation of the collective bargaining contract between the secondary employer and the petitioner in certiorari. The contract provided that a supervisor could not handle freight normally handled by an employee. (Printed Record, 79, Joint Appendix, 58, 59, 70, 71, 72, 73, 75, 76, 77, 78.)

The Trial Examiner recommended that an Order be

entered not only requiring the petitioner in certiorari to cease and desist from the alleged conduct as to the companies involved in the controversy, but as to any company within the Board's jurisdiction. (Printed Record, 87, 88, 90, 93.) This remedy was given notwithstanding the fact that there had been no allegations in the Complaint that the petitioner in certiorari was a flagrant or wilful violator of the National Labor Relations Act or that petitioner had been guilty of prior violations of the Act or that any unusual remedy would be sought. (Printed Record. 34 through 39.) The Intermediate Report stated that the remedy followed that granted in case 11-CC-16 and for the reasons there stated. (Printed Record 85.) Case 11-CC-16 was subsequently dismissed by the Board. (Joint Appendix, 238.) The decision as to the so-called Broad Order was based primarily upon four former cases in which the petitioner had been held to have violated the National Labor Relations Act. (Joint Appendix 194.) No mention was made in the evidence of said cases, of the fact that any unusual remedy was sought nor of the contention that petitioner was a wilful or deliberate violator of the law.

Exceptions were filed to the Intermediate Report (Printed Record 99 through 109), and the National Labor Relations Board overruled the exceptions and sustained the Intermediate Report in its entirety. (Printed Record, 110 through 125.) A petition to review was filed with the United States Court of Appeals for the Fifth Circuit, and the National Labor Relations Board cross-filed, seeking enforcement. Said Court, on June 4, 1964, rendered its opinion denying the relief sought in the petition to review and enforcing the Board's Order as

written. (Appendix to Petition for Certiorari, pages 24-33.)

REASONS REVIEW SHOULD BE GRANTED

Petitioner respectfully submits that this Court should grant this review on certiorari because the case involved is of great public concern and contains matters of gravity and importance not only to your petitioner but also to others similarly situated throughout the entire United States. The gravity and importance of the matters to public concern will be manifest to this Court upon consideration of this petition for certiorari. Petitioner suggests and urges the following reasons, among others, why this petition for certiorari comes within the purview of this Court and should be granted:

1. The Board's Broad Order is a Denial of Due Process of Law.

The Board granted a normal Order as to Local Unions 55, 701 and 509, only requiring said Unions to cease and desist from engaging in certain conduct as to the companies related to the litigation in the case at bar. Notwithstanding the fact that said Unions were held by the Board to be equally involved in the alleged unfair labor practices with petitioner in certiorari, the Board granted a different and unusual remedy as to petitioner in certiorari, requiring petitioner in certiorari to not only cease and desist from said alleged conduct as to the companies relating to the dispute, but also as to "any other person engaged in commerce or in an industry affecting commerce."

The Board makes no contention that such an unusual

remedy is justified by the allegations of the Complaint or by the facts to be found in the record.

There is substantial conflict in the United States Courts of Appeals on the issue of whether the National Labor Relations Board is empowered to go beyond the record and the pleadings to prohibit a Union from engaging in certain conduct as to persons in no way involved in the litigation. The Fifth Circuit Court of Appeals now holds that the Board is so empowered, whereas the Courts of Appeals for the Sixth, Seventh and First Circuits have held to the contrary. The Seventh Circuit quotes with approval language to the effect that such action is a deprivation of "hard won principles of Anglo-American Law" and "smacks too much of attainder." *National Labor Relations Board* v. *United Brotherhood of Carpenters,* (7 Cir.) 276 F. 2d 694; *National Labor Relations Board* v. *Local 476, United Association,* (1 Cir.) 280 F. 2d 441, and *National Labor Relations Board* v. *Grandman Allen Company,* (6 Cir.) 281 F. 2d 797.

At the very best, the evidence in the record is extremely weak and the Board does not contend that the evidence would justify the issuance of its so-called Broad Order. It was found that the President of the Union, on one occasion, and job stewards on two or three occasions, were asked by members whether said members were required to handle the struck freight, and the reply given was that they were protected by their contract if they chose to handle it, but that the decision was up to each individual employee to do as he pleased. (Printed Record 77, 78, 80, Joint Appendix 18, 19, 20, 81, 82.) It will be noted that this was prior to the 1959 amend-

ments to the National Labor Relations Act, and a hot cargo clause was at that time entirely legal. There was one instance found of an organizer of Joint Council No. 9 requesting three employees to "honor the picket line." (Printed Record 78, 79, Joint Appendix 25 through 36.) It was found that on one occasion a job steward, who was a checker, told the employee of the *primary* employer that he would not check the freight because of the strike. (Printed Record 80, Joint Appendix 12, 13, 14, 15.) On one occasion a job steward acting contrary to express instructions of the Union called a work stoppage because a supervisor was handling the freight in violation of the provisions of the contract that no supervisor could perform work normally done by the rank and file employees. (Printed Record 79, Joint Appendix 58, 59, 70 through 78.) With 300 job stewards, a great number of whom were directly or indirectly involved in this strike, and with a total of 7,000 members in the State of Georgia making thousands of instances in which an opportunity for violation of the law could have presented itself, the above constitutes the only findings of the Board upon which its Order is based.

The Labor Board based its finding that an unusual Order should be granted as to Local 728, petitioner in certiorari, not primarily upon the above evidence but principally upon four other cases relating to alleged violations occurring years before any of the matters alleged in the Complaint.

Not only did the Complaint fail to indicate that any unusual remedy would be granted, but no where in the pleadings is it suggested that Local 728 has shown by prior conduct that it was a flagrant, repeated and delib-

erate violator of the law. (Printed Record, 34 through 39.) The Complaint alleged only violations relating to the strike against Overnite Transportation Company, and gave notice only that questions relating to that strike were involved. No contention was made by Counsel for the General Counsel at the trial before the Trial Examiner that Local 728 had exhibited a pattern of conduct prior to the facts relating to the controversy at bar which should be taken into consideration in the action of the Board. The Trial Examiner was not even requested to take judicial knowledge of other decisions. The case was tried entirely upon the allegations contained in the pleadings, which made no mention of anything other than the then current strike.

It is respectfully submitted that the petitioner in certiorari was never given "its day in court" on the issue of a Broad Order, and that the Board's action in this case is a violation of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The right to introduce evidence and to be heard on this issue was an extremely important right. The question of wilfulness is relevant to the issue of whether a so-called Broad Order should be rendered. The efforts made to obey the law in prior cases, whether some of said violations are caused by disobeying of instructions, or by design of the Union, whether the prior cases involved sincere tests of very close, unsettled points of law, and the entire question of whether the Union had shown a contempt for the law was very relevant to the question of whether a Broad Order should be issued. The Board

has gone completely outside of the record to find justification for the granting of this unusual remedy.

The fact that this is a flagrant violation of the Fifth Amendment to the United States Constitution is clearly settled by judicial decisions. In the case of *Morgan* v. *United States*, 304 U. S. 1, 58 Sup. Ct. 773, the Supreme Court of the United States said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

The United States Court of Appeals for the Fifth Circuit, in the case of *NLRB* v. *Operating Engineers*, 267 F. 2d, 418, had occasion to determine the validity of a similar Order of the Board under similar circumstances. The Court there held:

> "There is nothing in the record to justify any such broad coverage. . . . . .
>
> "We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important and basic to a fair administration of the Act, the hard won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize an offender as a bad

> actor smacks too much of attainder to be acceptable to this court. We are committed to a narrower view of the proper scope of orders that may furnish the basis for contempt proceedings."

In the case of *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 276 F. 2d, 694, the United States Court of Appeals for the Seventh Circuit quoted the above language with approval and adopted said language. Said case of *NLRB* v. *Operating Engineers*, supra, was also quoted with approval by the United States Court of Appeals for the Sixth Circuit in the case of *National Labor Relations Board* v. *Grandman Allen Co.*, 281 F. 2d, 797, and by the Fifth Circuit Court of Appeals in the case of *National Labor Relations Board* v. *Dallas General Drivers*, 281 F. 2d, 593. The Fifth Circuit Court of Appeals also refused to enforce a Broad Order as to Local 728, petitioner in certiorari, in the case of *Truck Drivers & Helpers Local Union 728* v. *NLRB (Genuine Parts Company)*, 265 F. 2nd 439.

The Supreme Court of the United States has decided this question in the case of *Communication Workers, etc.*, v. *NLRB*, 362 U. S., 479, in which case the Court said:

> "Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated, and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer.' It would seem clear that the authority conferred on the Board to restrain the practice which it has found to have been committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

> "In the Court of Appeals, the Board sought to justify the breadth of its order by relying on two compromise settlement agreements involving activities of the International and other locals against other employers. Neither the opinion of the Board nor that of the Court of Appeals in this case indicates any reliance was placed on such agreements, and in this Court the Board disclaims any such reliance."

To the same effect see *National Labor Relations Board* v. *Local 476, United Association,* 280 Fed. 2d 441.

It will be further noted that enforcement of a broad order would make the Court of Appeals the trial court in future proceedings rather than for the Board to so act as intended by Congress.

The United States Court of Appeals for the Seventh Circuit ably stated this problem in the case of *National Labor Relations Board* v. *United Brotherhood of Carpenters,* 276 F. 2d 694 in which the court said:

> "The effect of its argument here is that, in asking us to enforce its order, it would impose upon a court of appeals on a possible future hearing of contempt charges, the duty of resolving factual issues as to whether an illegal secondary boycott has been committed against a particular primary employer not named in the present proceedings. This duty we should not undertake because, first, that determination should be made by the Board before it enters its Order, and secondly, we do not believe it was the intent of Congress that courts of appeal should be so used in enforcement proceedings to remedy deficiencies in the Orders sought to be enforced."

2. The Cases Cited by the Board do not Establish any Need for a Broad Order.

The function of the Labor Board, even as of the Courts, is not just to punish or deter law transgressors, but to be a part in the ever expanding development and evolving of the law. This is particularly true in fluid and unsettled fields in which the minds of able and neutral men may and do differ. In many areas of the law the field is comparatively static and expands and develops very slowly. However, the field of Labor Relations Law is ever expanding and at a constantly accelerating pace. There are many areas of Labor Relations Law where the line is very fine between what is legal and in the public interest and what is illegal and to be prevented. These problems can be determined only by putting them to the test and by test cases creating precedents which serve as a future guide not only for the litigants but for many others as well.

The litigant who makes such a test serves a public function no less than does an administrative agency which adjudicates the problem. Any litigant who makes himself the "guinea-pig" in this process is going to have more cases in which he has been found to be incorrect than the litigant who always remains passive and lets others resort to the expense and trouble of taking the lead in determining novel or unsettled points. To punish by unusual remedy those who in good faith take such a lead is to hamper if not completely destroy the entire process which has played such a vital part in the evolving and settling of the law.

How completely unsettled and fluid the law is in this area is clearly and definitely established by the history of the Board's decision as follows: In the Conway Express case, re International Brotherhood of Teamsters, 87

NLRB, 972, affirmed Rabouin v. NLRB, 2 Cir., 195 F. 2d 906, the Board split three ways, the majority holding that nothing in a hot cargo provision as such was repugnant to the policy of the statute and that the Union had not violated Section 8 (b) (4) (A), when, pursuant to the provisions of the contract, it had instructed employees not to handle goods, and the employers had apparently acquiesced. In the McAllister case, International Brotherhood of Teamsters, 110 NLRB, 1769, two members of the Board were of the opinion that Section 8 (b) (4) (A) prohibited all secondary boycott and that a contract between the secondary employers and the Union was ineffective to waive the protection granted to the public. The Chairman of the Board, Chairman Farmer, concurred but based his decision upon the fact that unlike the situation in the Conway case the employer had not acquiesced in the employee's failure to handle the goods. Two members of the Board dissented on the ground that since the employers had by the hot cargo provisions consented in advance to the boycott there was no strike or concerted refusal to handle goods within the meaning of the statute.

In the Sand Door case, Local 1976, United Brotherhood of Carpenters, 113 NLRB 1210, members Farmer and Leedam held that although hot cargo clauses were not themselves in conflict with the statute an appeal by the Union to secondary employees to refuse to handle goods because of the contractual provision violated Section 8 (b) (4) (A). Member Rogers concurred but on the basis of the view that hot cargo clauses as such violated the statute. Members Murdock and Peterson dissented, adhering to the views they had expressed in McAllister.

In the American Iron case, General Drivers Union 1956, 115 NLRB 800, two members of the Board held that a direct appeal to the employees was forbidden, whether or not the employer acquiesced in the boycott. One member concurred, holding the hot cargo clause illegal, and two members dissented, maintaining the Conway Express case doctrine should apply.

In the case of Truck Drivers and Helpers Local Union No. 728, 119 NLRB 339 (Genuine Parts Co.) two members of the Board held that in those instances in which the secondary employer is a common carrier subject to the Interstate Commerce Act the hot cargo clause was per se violative of the Act. One member held that a hot cargo clause was illegal in any event. Another member held that while the hot cargo clause was not illegal inducement of secondary employees on the basis of said clause was illegal. The fifth member dissented, still taking the position taken in the Conway Express case.

This history of the Board's numerous splits in its decisions and reversals of position is much more fully set forth by the Supreme Court of the United States in the case of *Carpenters* v. *National Labor Relations Board*, 357 U. S. 93, to which case the Court is referred.

In the case of Washington Coca-Cola Company, 107 N.L.R.B., 299, the Board held that a Union violated Section 8 (b) (4) (A) and (B) by following the trucks of the primary employer to secondary premises and picketing the drivers of said primary trucks at secondary premises if there is a primary site in existence at which said employees could be picketed. This decision was also rendered by a divided Board.

Finally, after disapproval of this so-called Washington

Coca-Cola doctrine by various of the United States Courts of Appeals, the Board again reversed its position in the case of Electrical Workers (Plauche Electric, Inc.), 135 N.L.R.B., 250, and held that the presence of a primary site at which the employees could be picketed did not make the picketing of said employees at a secondary situs per se evidence of violation of the Act. This decision was rendered by a three to two Board majority.

If a litigant claiming to be acting in good faith in unsettled areas is always unsuccessful, doubt may be cast upon the sincerity of the litigant's motives. However, an examination of the four cases cited by the Board as justification for a Broad Order in the case at bar reveals the following: In the damage suit in Empire State Express case, under Title 29, Sec. 187, U.S.C., based on substantially the same evidence as in the Board case in which the entire transcript in the Board proceeding was introduced in evidence, 293 Fed. 2d 414, the Fifth Circuit Court of Appeals held that the position of the Union was entirely correct, that the alleged secondary party who was picketed was actually the alter ego of the primary party, and the position that had been taken by the Board was entirely wrong. In the case of Campbell Coal Company, the first appeal to the United States Court of Appeals for the District of Columbia, 229 Fed. 2d 514, resulted in a holding that the Board's so-called Washington Coca-Cola theory was not sound and should be reversed. In the subsequent appeal after remand, 249 Fed. 2d 512, the Court was faced with a further novel holding of the extent to which a Union could go in inducing an employer, as distinguished from his employees, and the relationship of such inducement to other

activities in the case. The Court split two to one in holding against the Union in this respect.

The Board finally, in the Plauche Electric Company, Inc., case, 135 NLRB, 250, completely repudiated its Washington Coca-Cola doctrine, citing, among other reasons, the aforesaid Campbell Coal Company case in which said doctrine has been disapproved by the Court of Appeals. In a third of the four cases, the Genuine Parts case, 265 Fed. 2d 439, the Trial Examiner, the United States District Judge and a minority of the Board held the Union to be right and the Board to be wrong. The fourth case, involving National Trucking Company and Ford Motor Company, 228 Fed. 2d 791, represented the settling by the Fifth Circuit Court of Appeals of the line to which the so-called Otis Massey case, 225 Fed. 2d 205, had carried the law. Therefore, it will be seen that in one of the cases the Union was completely vindicated and in another the Union was vindicated in part and an important decision of the Board overruled. All of these cases were precedent setting in their nature and whether or not they fall under the above referred to group of cases in which the law is unsettled and reasonable neutral judicial minds honestly differ is best determined by the fact that such minds did in three of these four cases differ.

Even the history of the four cases cited by the Board shows the need for a litigant to be free to carry a doubtful point to the Court of Appeals rather than accepting the position of the Labor Board as the final authority in this unsettled field. The result of Local 728's actions and litigating of these cases is that the Board's position as to picketing of primary employees away from the primary

site was repudiated in the Appellate Courts and is no longer the law, and the Board's decision as to what constitutes a neutral employer as distinguished from the alter ego of the primary employer was overruled and the law clarified in the subsequent damage suit between Empire State Express and Local 728. The undersigned cannot believe that public policy would have been served had Local 728 been silenced by means of a Broad Order and the Board's position in these matters though mistaken and erroneous to have remained the law of the land.

The latest case cited by the National Labor Relations Board as justification for the granting of a Broad Order was the case of *Truck Drivers & Helpers Local Union 728* v. *NLRB, (Genuine Parts Co.)*, supra. Although at that time the Court had before it all of the contested cases cited by the Labor Board in the case at bar as justification for its Broad Order, the Fifth Circuit Court of Appeals refused to enforce such an Order. Certainly the very weak facts of the case at bar cannot justify a departure from that decision.

The Board cites opinions of United States District Courts on prayers for temporary injunctions in cases which were settled and never went to hearing before the Board. These decisions of the District Courts are not determinations of the merits of the controversy, but the Court only passed on whether the "Regional Director had reasonable cause to believe" a violation had occurred. Decisions of the District Courts in Section 10 (l) injunction cases are no more conclusive of guilt than an indictment would be in a criminal case. Further, all of these cases were heard on affidavits, not oral testimony,

and no chance for cross examination was afforded. No hearing was ever held by anyone on the merits of these cases.

The cases cited without trial all contain statements to the effect that they did not constitute an admission of guilt and the Fifth Circuit Court of Appeals in a case involving Operating Engineers, 267 F. 2d, 418, held that for the Board under these circumstances to hold such cases to be the basis of a Broad Order was to "in effect repudiate stipulations solemnly entered into by the Board."

It will be further noted as to these cases that while not in all instances were they alone based on the Board's Washington Coca-Cola doctrine, said doctrine was a very large integral part of the General Counsel's position and said doctrine has now been repudiated by the Board as well as the Courts.

It is respectfully submitted that this denial of due process has placed petitioner in certiorari in a position where it cannot make a test case of any future doubtful points, but must treat the National Labor Relations Board as the Court of final authority no matter how doubtful the correctness of its (the Board's) position may be. Petitioner was placed in this position as the result of litigation in which it was given no notice that any attempt would be made to so restrict its rights and in which the Board acted on the basis of matters in no way incorporated in the record. To permit this decision to stand and to permit said decision to be enforced will be to deprive petitioner of rights clearly protected by the Fifth Amendment to the United States Constitution.

CONCLUSION

As hereinabove set forth, the granting of an unusual and harsh remedy without notice and without evidence in the record to sustain it makes it imperative that this petition for certiorari be granted. A failure to grant said petition will have an effect upon Labor Relations throughout the country far transcending its effect on the immediate parties to this litigation.

Respectfully submitted

John S. Patton

JOHN S. PATTON

Attorney for Petitioner in Certiorari,
Truck Drivers and Helpers Local Union No. 728.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above Petition for Certiorari and Appendix on Mr. Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, Washington, D. C., and I have served copies of the said Petition for Certiorari upon the Solicitor General of the United States, as well as copies of the Joint Appendix and Printed Record filed in the United States Court of Appeals for the Fifth Circuit. August 26, 1964

John S. Patton

JOHN S. PATTON,
Attorney for Petitioner in Certiorari

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19358

TRUCK DRIVERS & HELPERS LOCAL UNION NO. 728, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20757

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

LOCAL UNION NO. 55, LOCAL UNION NO. 71, AND GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 509, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT,

Respondents.

Petitions for Review and Enforcement of Orders of the National Labor Relations Board sitting at Washington, D. C.

(June 4, 1964.)

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges.

TUTTLE, Chief Judge: These cases, combined for oral argument, are considered jointly for the purpose of the opinion since they involve the same facts and the same order of the Labor Board. No. 19358 involves a petition by Local 728 to review and set aside an N.L.R.B. order, with a cross petition by the Board to enforce. No. 20757 is a petition by the Labor Board to enforce its order against Locals 71, 55 and 509. These Locals filed no exceptions to the Examiner's order and have made no response to the Board's petition. However, the Board has conditioned its request for summary enforcement of its order against these respondents on the enforcement by this Court of the Board's order against Local 728 in the other case.

The controversy which is present in both cases is an alleged conspiracy of the four Locals to engage in the illegal inducement of employees of secondary employers of Overnite Transportation Company in support of a concerted strike in four states.

The N.L.R.B. issued complaint No. 11-CC-16 at Winston-Salem, North Carolina, and produced evidence

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* Of the Ninth Circuit, sitting by designation.

showing Locals 71, 55 and 509 had engaged in prohibited activity in Virginia, North and South Carolina. Orders were issued against all four unions, Local 728 being joined on the theory it had participated in a single joint enterprise. Local 728 petitioned for review before the District of Columbia Circuit, but the Board requested a remand and dismissed the case as to Local 728.

The Board also filed complaint No. 10-CC-426 against the four unions alleging violations in the State of Georgia, which is exclusively within the jurisdiction of Local 728. Illegal inducements were found to have occurred and Locals 71, 55 and 509 were ordered to cease and desist secondary boycotts against Overnite Transportation. Case No. 20757 seeks to enforce these orders. A "broad-order," however, was issued against Local 728, requiring it to cease and desist secondary boycotts against any person engaged in commerce. Case No. 19358 is Local 728's petition to review and the Board's cross-petition to enforce.

The three questions presented are:

1. Whether Locals were entitled to a dismissal of complaint 10-CC-426, the Board having charged similar violations in complaint 11-CC-16? (Nos. 19358 and 20757.)

2. Whether there was sufficient evidence to show a violation of §8(b)4(A) and (B)? (Nos. 19358 and 20757.)

3. Whether the order requiring Local 728 to refrain from certain acts as to "any other person engaged in commerce or in any industry affecting commerce" is erroneous because not based on evi-

dence presented in this case, not referred to in the complaint filed, nor limited to parties to this cause? (No. 19358.)

In order that the answer to question 1 can be understood it is necessary to give a little procedural background, since the question arises by reason of the fact that two cases were filed by the Board, one in North Carolina and one in Georgia, which the Locals contend amounted to a splitting of the cause of action which gave rise to the Georgia case, complaint 10-CC-426, the case that produced the orders that are here complained of.

N.L.R.B. case No. 11-CC-16. The trial examiner found that in 1959 various Teamster Locals embarked on a campaign to organize Overnite, a freight trucking corporation in interstate commerce. Meetings were held in Atlanta and Charlotte to discuss courses of action in the campaigns. Picketing of Overnite terminals began on May 17, 1959, and also at the premises and terminals in Asheville and Charlotte of various customers and carriers doing business with Overnite (secondary employers) when Overnite trucks attempted to make deliveries. The pickets carried signs naming Locals 728, 71, 55 and 509 as those involved in the dispute. Also, there was evidence the secretary of Local 55 had sought to ascertain if there was any Overnite freight on the truck of a secondary employer and had suggested to the driver that he not handle any Overnite freight. The picketing of the premises of the secondary employer, when there was adequate opportunity to publicize the dispute by picketing of the primary employer, was found under the Washington Coca Cola doctrine, 107 NLRB 299, to be prima facie evidence of a purpose to induce

employees of neutral employers. That picketing plus the suggestion to the secondary employer's truck driver was held to show a violation of 8 (b) 4 (A) and (B) by Locals 55, 71 and 509. Local 728, though it did not seek recognition outside of Georgia, was held to be responsible for the picketing since it engaged in joint meetings with the other Locals to plan courses of action and it offered no testimony that it had not authorized the use of its name on the picket signs. These findings were adopted by the Board which entered cease and desist orders limited to Overnite in the cases of Locals 55, 71 and 509. A broad cease and desist order was, however, found warranted against Local 728, barring it from any secondary boycott activity, because it "had demonstrated a proclivity to violate the act by secondary boycott activity against persons with whom it develops disputes." The basis for this was the fact that Local 728 had been found to have engaged in secondary boycotts in four cases, while three other cases involving the same problem had been settled by stipulation. Local 728 filed a petition to review in the D. C. Circuit, but the Board requested the case to be remanded in light of its overruling of the Washington Coca Cola doctrine. On remand, the Board elected not to proceed with the case since Locals 55, 71 and 509 had complied with the orders and Local 728 was under an identical order in NLRB Case No. 10-CC-426.

NLRB Case No. 10-CC-426. The trial examiner originally recommended dismissal on the ground of multiplicity of suits. He noted that the case was identical to the one in No. 11-CC-16, which had been filed subsequent to the one facing him but which had gone to trial first. The NLRB reversed the Examiner on the

grounds that the rules provided each Regional Director could file a charge, that the two cases involved separate and distinct activities, that the violations alleged were different in nature, the Carolina one consisting of picketing at secondary premises whereas the Georgia one involved oral appeals said to constitute unlawful inducement, that consolidation was a matter within the administrative discretion of the General Counsel, and that witnesses for the hearing in each case resided near the place scheduled for hearing.

In his supplemental intermediate report the Examiner reaffirmed that the strike was a joint venture involving direct and secondary action in the Carolinas and Georgia by the Locals against Overnite. When the strike began Local 728's president informed the members that they should use their own judgment on whether to handle Overnite freight and notified, pursuant to a standard "hot cargo" clause, all companies in contract with Local 728 of the commencement of the strike. The Examiner then went on to list six incidents during the strike on which an 8(b)4(A) and (B) violation was found to have occurred:

> 1. A Local 728 employee of Atlanta-New Orleans Freight Lines called the president of the Local to ask if he should handle any Overnite freight, and the employee testified he was told, "I can't tell you anything. You do as you please. You don't have to handle no scab freight."
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> 2. An organizer for Teamster Joint Council No. 9 participated in picketing Overnite and asked three over-the-road drivers "to respect the picket line." Since these drivers made no pickups or deliveries

at Overnite terminals and thus had no occasion to cross picket lines, the Examiner found this constituted a general request to refuse to handle Overnite freight.

3. At the Georgia-Florida and Alabama terminal an Overnite truck pulled in and the men sat down and refused to unload it. The dock foreman checked the freight himself. The General Counsel's witness admitted that he had signed a statement that he started to work unloading the truck when a union steward told him he was not supposed to handle Overnite freight. The steward testified that he told the men they were not supposed to work when a supervisor (the dock foreman) was working.

4. At the Benton Express Terminal a shop steward, when asked by the employees whether they should handle Overnite freight, replied that under the hot cargo clause in the contract they would not have to handle it, but he did not tell them what they should do. He said that he would refuse to handle it.

5. At the B. C. Terminal, a shop steward told an Overnite driver that he wouldn't check freight off of Overnite because they were on strike. Other employees were around when this statement was made.

6. At Great Southern Trucking Co. a union steward who worked as a driver refused in the presence of other employees to move a trailer with Overnite freight on it. At other times the same steward told other employees that they should use their own judgment as to whether they should

handle Overnite freight but he admitted they knew what he would do.

These instances, taken together were sufficient to convince the Examiner of an overall pattern of action to induce secondary employees to cease handling. The other Locals were held responsible on the theory of joint enterprise set forth above. These conclusions were adopted by the Board, and the remedy ordered was that entered by the Board in 11-CC-16.

Locals 71, 55 and 509 filed no exceptions to the Examiner's order and did not answer the NLRB's petition in No. 20757. But the Board has conditioned its requests for summary enforcement of its order against them on the enforcement of the order against Local 728.

We first answer question 1 by stating that we do not believe that the Board's prosecution of two separate cases involving one large, overall scheme by the four Locals involved, warrants dismissal. As noted by the Board the 8(b)4(A) and (B) violations in North Carolina involved primarily the picketing of premises of secondary employers, whereas the Georgia violations were concerned solely with statements by union stewards. Thus there were two distinct legal issues involved, as evidenced by the remand to the Board of 11-CC-16 after the *Plauche Electric, Inc.* case, 135 N.L.R.B. 250, which would have no effect on the instant case. Moreover, convenience of the witnesses would seem to dictate that hearings be held in both Asheville and Atlanta.

In other considerations showed that two separate proceedings were improper, consolidation would have been the proper remedy, not dismissal, which would effectively

eliminate any binding determination of the charges since the subsequently filed proceeding in North Carolina was dismissed. Local 728 consciously chose to engage in organizational undertakings in both Georgia and North Carolina and consented to the use of its name in picketing activities in North Carolina as well as Georgia; it should not be heard to complain if it is held to account in both places.

Coming next to the question of the sufficiency of the evidence to sustain the finding of 8 (b) 4 (A) and (B) violations, we conclude that the record as a whole sustains the findings of the Board. Although it was legal, at the time of the controversy here, for individual members of the Locals to elect not to handle the "hot cargo," such conduct could not be urged upon the members by others representing the Locals even before the amendments of 1960. We think there is ample basis for the determination by the Board that, although the language used by the union's representatives was couched in language implying that each member could make his own decision, the pattern set by the leaders both in their volunteering the suggestion on occasion that the member did not have to handle the "hot cargo" and by their own conduct accompanied by pointed reference to the right of the individual to decide for himself, amounted to prohibited activity.

Finally, answering the third question, we conclude that the Board order is not an unwarranted remedy under the circumstances found by the Board to exist here. In addition to the facts of this case which resulted in a finding by the Board that Local 728 pursued an overall plan according to which the employees of eight

separate neutral employers were induced to refuse to handle Overnite shipments, the Board had other cases involving this Local which we think warranted its decision that it had "demonstrated a proclivity to violate the act by secondary boycott activity against persons with whom it develops disputes." We think the record satisfies the criteria which the Supreme Court has laid down in determining whether a Board Order is of impermissible breadth in *NLRB* v. *Express Publishing Company*, 312 U. S. 426, and *Communications Workers* v. *NLRB*, 362 U. S. 479. See also *NLRB* v. *Local 542 etc.*, 3 Cir., ... F. 2d . . . ., Dec. Mar. 10, 1964.

The petition to set aside the order of the Board in No. 19358 is DENIED. The order against Local 728 in that case is ENFORCED. The application of the Board for enforcement of its order against Locals No. 71, 55 and 509 in case No. 20757 is GRANTED and the Board's order is ENFORCED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

(A true copy. Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit. By..... Deputy. New Orleans, Louisiana. June 29, 1964.)

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19358

TRUCK DRIVERS & HELPERS LOCAL UNION NO. 728, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20757

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION NO. 55, LOCAL UNION NO. 71, AND GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 509, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT,

Respondents.

DECREE

Before: Tuttle, Chief Judge, and Pope* and Brown, Circuit Judges.

BY THE COURT: –

THIS CAUSE came on to be heard upon the petition of Truck Drivers & Helpers Local Union No. 728, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to review and set aside an order of the National Labor Relations Board dated September 11, 1961, and on cross petition for enforcement of that portion of the Board's said order issued against the above-named petitioner and upon the Board's petition for enforcement of that portion of its order against Local Union No. 55, Local Union No. 71, and General Drivers, Warehousemen and Helpers, Local Union No. 509, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent. The Court heard argument of respective counsel on April 14, 1964, and has considered the briefs and transcript of record filed in this cause. On June 4, 1964, the Court, being fully advised in the premises, handed down its decision enforcing in full the National Labor Relations Board's said order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated September 11, 1961, directed against Local Union No. 55, Local Union No. 71 and General Drivers, Warehousemen and Helpers, Local Union No. 509, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, their officers,

* Of the Ninth Circuit, sitting by designation.

agents, successors and assigns, and Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, its officers, representatives, agents, successors and assigns be and it hereby is enforced in full, and Respondents and their officers, agents, representatives, successors and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED: June 29, 1964.

(ORIGINAL FILED - JUNE 29, 1964)

separate neutral employers were induced to refuse to handle Overnite shipments, the Board had other cases involving this Local which we think warranted its decision that it had "demonstrated a proclivity to violate the act by secondary boycott activity against persons with whom it develops disputes." We think the record satisfies the criteria which the Supreme Court has laid down in determining whether a Board Order is of impermissible breadth in *NLRB* v. *Express Publishing Company*, 312 U. S. 426, and *Communications Workers* v. *NLRB*, 362 U. S. 479. See also *NLRB* v. *Local 542 etc.*, 3 Cir., ... F. 2d . . . ., Dec. Mar. 10, 1964.

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APPENDIX B

United States Court of Appeals

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No. 19358

TRUCK DRIVERS & HELPERS LOCAL UNION NO. 728, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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agents, successors and assigns, and Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, its officers, representatives, agents, successors and assigns be and it hereby is enforced in full, and Respondents and their officers, agents, representatives, successors and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED: June 29, 1964.

(ORIGINAL FILED – JUNE 29, 1964)